

**Subject:** From Mass Lawyers Weekly: Bar Advocates Can the System Be Saved?  
**From:** Anne Goldbach <agoldbach@publiccounsel.net>  
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**To:** "everyone@publiccounsel.net" <everyone@publiccounsel.net>

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Article of the week from *Massachusetts Lawyers Weekly*:

## Bar Advocates Can The System Be Saved?

### *A Roundtable Offers Differing Views On What's Best For The State's Appointed Counsel*

The state's bar-advocate system — which relies on the participation of so many sole practitioners and small-firm lawyers — is in dire straits. Everyone thinks so — the Committee for Public Counsel Services, bar advocates themselves, and Gov. Mitt Romney's chief legal counsel, Daniel B. Winslow, who has proposed top-to-bottom reform for the system.

Bar advocates in Massachusetts earn as little as \$30 per hour — a wage far below that of many other jurisdictions and a marathon-distance from market rate. And these court-appointed lawyers often have to endure interminable delays before they get paid. The result has been something of an exodus of attorneys from the system, creating a constitutional crisis in the courts.

This conundrum also means a backlogged civil docket where cases languish while judges spend time scouting out attorneys to represent the indigent and take extra effort to ensure that pro se litigants' rights are preserved in cases where bar-advocate counsel couldn't be obtained.

In response, the Governor's Office suggested a multi-faceted plan that attempted to address the crisis — not by increasing the hourly rate paid to bar advocates, but by redefining indigency, decreasing overhead and proposing management reforms within the CPCS, the state agency that incorporates bar advocates, among many other functions.

The plan was the subject of a recent Lawyers Weekly editorial ("A New Plan For Bar Advocates," March 8) that pointed out several flaws in the proposal but suggested that in this time of crisis, it was worth a look-see as a pilot program.

Bar advocates disagreed, loudly and repeatedly.

A flurry of letters to the editor reflected that bar advocates (in apparent unanimity) thought the governor's proposal was an insulting plan that, in the end, would likely result in the unthinkable: fees getting even lower.

To clear the air, Lawyers Weekly assembled four interested parties to allow for a meaningful debate on the issue.

Participating in the discussion were Daniel B. Winslow, chief legal counsel to the governor; William J. Leahy, chief counsel of CPCS; and bar advocates Randolph Gioia, co-chairman of Suffolk Lawyers for Justice (SLJ), and Thomas E. Workman, on the board of directors of Massachusetts Association of Court Appointed Attorneys (MACAA) and vice president of Bristol County Bar Advocates.

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*Q. Why do bar advocates do court-appointed work in the first place?*

**Gioia:** I went to law school because I wanted to be a criminal defense lawyer. When I started out, I found it to be a real challenge to stand up every day and be representing a client against the government — a person who had very little say in the political process, a poor person — and I wanted to get the experience to be able to try cases. Some lawyers have to do bar advocacy work. Some do it because they're idealistic and they want to be the person that stands between the government and the person who's about to possibly go to jail. And in between there I think there's a range.

**Workman:** I do the work because the difference this country has from all other countries in the world is our Constitution and our system of laws. Massachusetts has a system from which was derived the United States' system rights.

*Q. Some have said that the public defender system in place here in Massachusetts is a good model but for the rate of pay. Is that something you agree with?*

**Leahy:** There's no question that the Massachusetts model is a very effective model and there is also no question that the single most significant flaw is the inadequate funding to support that system. Massachusetts, at one time, was the national leader in supporting the right to counsel and enforcing it. We were ahead of the *Gideon* decision by six years. (*Gideon v. Wainwright*, the 1963 seminal U.S. Supreme Court case conferring the right to counsel to every American in a criminal case). We have now fallen behind — not because our laws aren't good, not because our structure isn't good, but because the funding has gradually strangled the strong system. There is one structural flaw in the counsel system and that is that large chunks of that system have no staff attorney component.

**Winslow:** I just wanted to say at the outset that there are no villains here. Both as a judge and as a lawyer I've worked with all three of these lawyers as well as many of the people on whose behalf they sit here today. The bar-advocate and the public-defender system is a story of people with great dedication and great care and compassion and passion for our system of justice. The funding is, however, a reality within which our system must operate. To say that the system is great but for the lack of funding, in the absence of funding, is to ignore the reality of the grave economic situation that we're confronting right now. Governor Romney supports the bar-advocate model currently in effect. He supports injecting these tens of millions of dollars into the local legal economy. But therein lies the rub. How can we do that and do so within our means?

**Leahy:** I have a good answer to that, actually. We can stop fueling the extravagant spending on corrections. We can reform mandatory sentences. We can dramatically cut the number of cases that are assigned to the CPCS, which now numbers 240,000 every single year, by reforming the civil infraction law [and] by reforming the sex offender registry law, which reaches back into the 1960s and the 1970s. We are wasting money throughout this state government and to say this state cannot afford to implement the *Gideon* right when other states do, and when we always have, is simply false.

**Gioia:** We're way below other states — the third lowest state in the country. There was a study

done recently that showed the average overhead nationwide for a small firm is \$48 per hour. So we're not talking about the margin. I think what Mr. Winslow is saying is that [the Legislature and the administration] have made a conscious decision to say there is a segment of our population, namely poor people and children in need of services, who don't deserve the Sixth Amendment.

**Workman:** I would add to that it's not just the bar advocates that are being paid so poorly. In Massachusetts we have singled out the judicial branch to receive special treatment and that special treatment pays our judges the fourth-lowest salary in the country when it's adjusted for cost of living. Our district attorneys are paid some of the lowest salaries. Our public defenders are paid lower even than the assistant district attorneys. The attorneys general are paid the same salaries the district attorneys are paid. And then the bar advocates are paid a small fraction of that amount. And we are spending our money on things like incarceration. The Boston Globe recently mentioned that Massachusetts has the third-highest incarceration costs in the country per 100,000 people.

**Winslow:** We believe that [CPCS] is one of the few agencies that consistently grows its budget in real dollars despite shrinkage everywhere else in the budget. I do want to respectfully disagree with [Gioia's] statement. This kind of heat rather than light, I think, has clouded the debate. The administration does believe that poor persons are deserving of the Sixth Amendment and to say anything to the contrary is simply histrionic. It is true that the hourly rate of our bar advocates is among the lowest in the nation. However, compensation for bar advocates is not just the hourly rate. It's the hourly rate times the hours on the case, plus the overhead costs, plus the time value of money. In the governor's budget he proposed to look to these other factors to see if it's possible to reward lawyers for efficiencies in their practice. If you develop efficiencies in your practice, those efficiencies will be given back to you as a reward — an increase, effectively, in compensation.

**Leahy:** The governor's budget proposal is dead. It did not convince a single legislator and it did not persuade a single bar-advocate program. It's a dead issue.

As far as agency growth, every year many new bills have passed which build CPCS' costs. And respectfully, for the governor's chief legal counsel to come here and complain because the agency has had very slight growth in its budget over the years, with all the accumulated load of now 240,000 cases annually, when that same administration does nothing to reduce the case intake and does nothing to reform the civil infraction statute, is really not appropriate.

**Workman:** I say to people now as I'm in court, "You know, in 1981 if I sat here and worked an hour I was paid \$35. Now I'm paid \$30." That's not adjusted for inflation. That's real dollars. We've had almost a 20 percent pay cut in almost 24 years. Show me anyone else in government that's working for 20 percent less than they were in 1981. I don't think you'll find anybody.

**Winslow:** Bill has pointed out that in his view the governor's House 1 proposal is dead. The only other [proposal] that's been publicly vetted to this point is the House Ways and Means proposal, and that provides a sharp contrast to the governor's proposal. There are significant forces on Beacon Hill that want to move away from the bar-advocate model and toward a public-defender model. Governor Romney would like to support the bar-advocate model within our fiscal capacity to do so. ... [But] the governor's proposal suggests that people should pay for counsel within their ability to pay, and only those persons who are truly destitute should have free lawyers.

*Q. You mentioned earlier, Dan, about working more efficiently. How exactly could bar advocates do the work more efficiently than they do currently?*

**Winslow:** Anybody or any firm or agency, we suggest, is capable of a 5 percent improvement

in their efficiency, or a 10 percent improvement in their efficiency. It is very rare for bar advocates to resolve cases at arraignment, although about 15 percent of cases in the District Court get resolved at arraignment. That's an example. The proposal specifically encouraged dismissal or conversions to civil infractions, or filing without a change of plea to resolve cases at arraignment. That would be a way to have the small misdemeanor case go away without any criminal consequence. That's not the practice in Massachusetts. It's not an uncommon sight in our District courts to see lawyers mark up a case for motion and not even file a motion. So there's another visit to court — another billing event — that really doesn't advance the case toward resolution. Shifting the incentive to lawyers, we believe, would result in a compensation increase — not more dollars, but allowing lawyers to earn those same dollars in less time.

**Workman:** I think the governor has the false idea that somehow attorneys control their time and the number of times they need to appear in court for court events. I can't tell you how many times I've appeared at court ready for trial with all my witnesses and it's not reached because of court congestion or because the commonwealth isn't ready. And they ask for a continuance and it's routinely granted. There may be a very good reason for requesting a motion date and then not filing a motion. If I've just been assigned a case and I think there is a motion to suppress, I'm going to ask for a motion date. If upon further investigation I discover that the motion doesn't lie, I'm not going to file a frivolous motion. But at the time of assignment it may have been the only prudent thing to do, and if I hadn't asked for that motion date I'd be guilty of malpractice.

**Gioia:** Private counsel might have been retained weeks before so you establish a rapport with your client before the arraignment. You get to know about the case. The bar advocate finds out about the case on the day of the arraignment, meets his client and is supposed to resolve the case? What kind of justice is that?

*Q. Is there some common philosophy that has been carried over from one governor to the next, one Legislature to the next, that has prevented the bar-advocate pay from increasing?*

**Workman:** Bar advocates are not a popular constituency. If the Legislature has to choose between allocating more money for drugs for seniors or more money for indigent defense, they're going to allocate the money for the seniors every time. We also recognize that we don't have an organized constituency, up until recently. The personality type of a criminal defense attorney is an individual who is often seen as a "cowboy." That does not lend itself well to that person being a good team player or getting with the other bar advocates to advocate for themselves.

*Q. Can this system collapse?*

**Workman:** It can.

**Leahy:** The system is collapsing right now. The last thing I did before I came over here today was to declare a state of counsel emergency over in Hampden County, where the system is literally falling apart as we speak. I've called for a summit meeting out there because people are in jail without lawyers. It's one thing to be without a lawyer, but it's another thing to be in jail without a lawyer. That's a flagrant violation of the constitutional right to counsel, and it's going on every day, at least in the Springfield-Holyoke area. It's got to stop.

**Winslow:** I agree with [Workman and Leahy] that the system is collapsing around our ears. I doubt that the system will sustain another year unless significant changes are made.

*Q. What, if anything, do bar advocates like about House 1?*

**Leahy:** There is a wonderful outside section in H1 that says CPCS, at the end the fiscal year, may give bonuses of up to 25 percent of annual income to the bar advocates, your private

assigned counsel and your staff attorneys.

**Winslow:** ... from client fees.

**Leahy:** Yes, from client fees. That's the whole problem with H1. It's too much from client fees — about one-fourth — and that just isn't realistic. But it's wonderful recognition, and I credit Dan Winslow. I don't think I've seen in a budget before — at least from a governor recently — that the rates of compensation are too low. That is a significant breakthrough.

**Workman:** On the efficiency issue, as we've squeezed the courts and as we've cut their budgets, they've responded with policies that help to optimize their sphere of influence. For example, in the Taunton District Court, if you need an interpreter you come on the fourth Thursday of the month. And what you'll find is 15 to 20 bar advocates standing in court waiting to get to the one critical resource. Because the court pays the interpreter, they deem that to be the critical resource to optimize at the expense of paying a large group of bar advocates to be there. ... We are not a poor state. The second-largest group of contractors in the commonwealth are snow and ice workers who are paid market rates. A snow and ice worker will make more in one year working evenings and a few days than a bar advocate will earn working 900 hours. There's something wrong.

*Q. The theme heard over and over again is: "Right now we don't have the money to fund bar advocates." And the chorus comes back and says: "We do have the money. It just happens to be in the wrong places right now" ...*

**Winslow:** Building on the snow and ice as an example, you may recall the controversy this last winter because all snowplow operators were given GPS (global positioning system) cell phones so they would be able to be dispatched by remote location and it could be seen that they're actually doing their work. There was a huge outcry by the plow operators. Eventually they conceded the point and accepted the GPS in their trucks. What we found is there is a significant cost savings for snow and ice operations because change was embraced and cost savings and improved operations resulted. I have reached out to county bar advocate associations and said one simple thing: make [the proposal] optional on a per lawyer basis. Let lawyers opt in for at least six months and have a six-month opt out. There has been organized resistance even to allowing lawyers as professionals to make this individual choice.

*Q. Why won't anyone give it a chance?*

**Gioia:** I'll tell you at Suffolk Lawyers for Justice, we've met with Mr. Winslow a number of times and we've discussed House 1. I said, "Why don't we make it a pilot program in Suffolk County because if it's going to work or if it's going to fail, it's going to happen here." And people said, "If it goes in Suffolk County, I'm off the list." And they said every lawyer in Superior Court is going to be off the list.

*Q. Is that because they get paid so little right now, they're afraid this system is going to pay them even less?*

**Leahy:** When he proposed this system, the governor announced that it was a \$15 million savings. So let's be clear about what its intent was. It was to save money on an already low-balled budget. I don't think it's right for Dan Winslow to cast dispersions to suggest that some unnamed individuals are somehow strong-arming people against entertaining a valid proposal. Dan ... I'll give him tremendous credit for his energy and his enthusiasm. He has taken it everywhere. What he has not done is listened. What the administration has not done is listened. I don't want to hear that we have closed minds. I do want to hear that funding will accompany rhetoric.

**Winslow:** Well I just want to issue a challenge: Is there a county bar-advocate organization, or

CPCS separately, that will allow the option for lawyers on an individual basis to have the choice between the House proposal and the governor's proposal on retainer-based defined compensation? If no lawyers choose this option, then so be it. At least we know it wasn't attractive enough to have the option. **Gioia:** No one, at least in Suffolk County, has ever denied anyone the right to do that or said that lawyers can't do it. I don't know what counties [Winslow] is talking about.

**Workman:** We communicated the program to all the bar advocates in Bristol County and there's not a single one that wants to participate because they see that the program is designed to cut the compensation pay for bar advocates. I think Mr. Winslow has actually said in the past that the compensation is inadequate, and it's indefensible.

**Winslow:** ... hourly rate.

**Workman:** ... hourly rate is inadequate. The governor's just simply saying we're going to cause people to become more efficient by cutting the amount we pay them and they'll figure it out. It doesn't work that way. You have to give people the tools to make things more efficient.

**Winslow:** Governor Romney will not walk away from the bar-advocate program. For the last two fiscal years when the program was underfunded or exceeded its appropriation, the governor — not the Legislature — filed supplemental requests on behalf of bar advocates. If the governor's program is adopted on a pilot basis, even on an individual option basis, if this concern about lack of money comes to pass, I have every confidence that the governor will stand behind his program with adequate funding and supplemental requests.

**Gioia:** We don't have the time to experiment. We are losing lawyers in our program every day because they're discouraged.

**Winslow:** We don't have time *not* to experiment. One point we've all agreed on around the table is that our bar-advocate system is collapsing around our ears and likely will not sustain another fiscal year. We don't have the luxury not to try new ideas.

**Leahy:** And we have the best counsel system in the nation. We don't need systemic reform. We need adequate funding and it's just a terrible thing that Governor Romney has come in and identified a system in crisis and the solution is we're going to do it more cheaply? The ideas in H1 are unworkable. That's why they didn't succeed. It's not because people are resistant to change.

*Q. How much should bar advocates be paid? Workman: CPCS met in December 2002. They recommended that bar advocates be paid \$60 per hour for District Court; \$90 per hour for Superior Court; and \$120 per hour for murder cases, and I believe that is appropriate. It certainly isn't market rate. You can't hire an attorney for \$60 an hour in District Court. In fact, the governor in his H1 proposal set the presumptive value of a District Court case at \$5,000, but proposes to pay bar advocates \$200. By doubling the rate from \$30 to \$60 an hour, we're asking to be paid about \$400 for a case that's worth \$5,000. So in terms of the market, today we're paid 4 cents on the dollar and we're asking to be paid 8 cents on the dollar.*

**Gioia:** I think the numbers that CPCS has come up with are OK. I know that when the City of Boston has to hire outside counsel to represent a police officer charged with misconduct, they pay that lawyer about \$120 an hour.

**Leahy:** Dan Winslow oversees — what is it, 830 lawyers? — in the executive branch. Not one of them starts at less than \$43,000 a year, plus. Our public defenders and our state prosecutors start at \$35,000 a year.

*Q. But isn't that set by statute?*

**Leahy:** Well what I'm saying is the contrast. I'm not saying [Winslow] picks it. And then there's the area where [Winslow] and the governor have trumpeted some savings by contracting with private lawyers to do state government work, but there are still a lot of those contracts that are up in the \$200-, \$300-, \$400-, \$500-an-hour range. The bar advocates are trying to get to \$60. These are not extravagant demands.

*Q. What's the status of the litigation?*

**Workman:** The government's motion to dismiss the Bristol County lawsuit was granted by the courts so that lawsuit is now dead. I was co-counsel and we discussed whether we wanted to appeal. We basically decided that the fastest route for us would be to re-file another lawsuit and learn from the decision. About the same time Holland & Knight has taken up the cause of filing a lawsuit on behalf of the bar advocates and are in the midst of evaluating their strategy and gathering affidavits. They've asked me not to say any more than that. But I don't think we're talking about several years off. I think we're talking about months or weeks.

*Q. Final thoughts?*

**Gioia:** think increasing the rate of pay should be looked at not as a cost but as an investment in the future. It costs \$45,000 a year to keep someone locked up in jail. If a bar advocate can do an extraordinary job and save six months or a year out of someone's sentence, there's going to be tremendous savings for the state.

**Leahy:** I'd like to look beyond H1 and look to the future. What is needed is for the other branches of government — particularly the Legislature, but also the judiciary — to play much more significant roles in analyzing what needs to be done to continue to provide indigent people with quality counsel. H1 did not make sense and that's why it went down as it did. It doesn't mean that we stand still. We cannot afford to stand still. Funding is a big part of it, weeding out ineligible people is a big part of it, improving the counsel fee collections is a big part of it. There are many segments, but it must be done in a manner in which all three branches of government are involved and in which the agency's voice is powerfully heard.

**Winslow:** [Leahy] earlier, quite graciously, gave us credit for paying attention to public defenders and bar advocates, and I can say that I've got the scars to prove it. I think that we owe it to Tom Workman and Randy Gioia and the thousands of bar advocates, and we owe it to Bill Leahy and the dozens of staff counsel to find a solution that we can afford. Because we cannot afford to have the public-defender system collapse this year or any year.

**Workman:** I certainly agree that we have to find a solution and I think the solution has been staring us in the face, and that is to increase compensation. Meaningful change that is constructive and that maintains the quality of service that's provided to our clients would be embraced by all bar advocates.

Questions or comments may be directed to the writer at [twright@lawyersweekly.com](mailto:twright@lawyersweekly.com).

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Anne Goldbach  
[agoldbach@publiccounsel.net](mailto:agoldbach@publiccounsel.net)  
Forensic Services Director  
CPCS  
44 Bromfield Street  
Boston, MA 02108